

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 1:09-cr-369

v.

HON. JANET T. NEFF

FRANK LEE COLE,

Defendant.

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**MEMORANDUM OPINION AND ORDER**

Defendant Frank Lee Cole has filed a motion for modification or reduction of sentence (Dkt 58) pursuant to 18 U.S.C. §3582(c)(2) based on the modification of the Drug Quantity Table with respect to cocaine base (crack cocaine).<sup>1</sup>

Section 3582(c)(2) permits a court to reduce the term of imprisonment of a defendant who has been sentenced based on a sentencing range that has subsequently been lowered by the Sentencing Commission. 18 U.S.C. § 3582(c)(2). Amendment 750 of the United States Sentencing Guidelines modified U.S.S.G. § 2D1.1, the Drug Quantity Table with regard to cocaine base (crack cocaine), and U.S.S.G. § 2D2.1(b). These modifications were made retroactive effective November 1, 2011. U.S.S.G. § 1B1.10(c).

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<sup>1</sup>Defendant previously filed a motion under 28 U.S.C. § 2255, which this Court dismissed (Dkt 54) and from which Defendant has since appealed (Dkt 55). In general, the filing of a notice of appeal deprives a district court of jurisdiction to act on matters that properly would be encompassed by the appeal. *United States v. Murr*, 1 F.3d 1243 (6th Cir. 1993) (citing *United States v. Sanzo*, 831 F.2d 671, 672 (6th Cir. 1987)). The Court determines that the merits of Defendant's request for a modification under § 3582 is not encompassed by Defendant's pending appeal, which concerns the propriety of the § 2255 vehicle in light of Defendant's plea-agreement waiver.

The defendant is entitled to a reduction of sentence pursuant to the policy statements of the U.S. Sentencing Commission.

Therefore, IT IS HEREBY ORDERED that Defendant's motion for modification of sentence (Dkt 58) pursuant to 18 U.S.C. § 3582(c)(2) is GRANTED. Defendant's sentence is reduced from 188 months in prison on each count to be served concurrently to 130 months in prison on each count to be served concurrently.

DATED: September 6, 2013

/s/ Janet T. Neff  
JANET T. NEFF  
United States District Judge